

UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

FATIMA PADILLA, by and through her )  
mother; MARIA GUEVARA; ROSA LOPEZ; )  
MARCELINO GRIJALVA-LOPEZ; ))  
GUILLERMO LUJAN; DORA MORALES; and ))  
JOSE DAVID ))  
CASSANOVA, on behalf of themselves and a )  
class of persons similarly situated, )

No. CIV 02 176 TUC FRZ

Plaintiffs,

**CONSENT DECREE**

v.

ANTHONY RODGERS, Director of the )  
Arizona Health Care Cost Containment )  
System, and TOMMY THOMPSON, Secretary )  
of the United States Department of Health and )  
Human Services, in their official capacities, )

Defendants.

Plaintiffs filed this action on their own behalf and on behalf of a class of similarly situated persons with End Stage Renal Disease. In the Second Amended Complaint, Plaintiffs alleged that Defendant Rodgers changed the definition of emergency medical services under the Arizona Health Care Cost Containment System ("AHCCCS") program to exclude coverage for kidney dialysis treatments/services and to require a "sudden onset" for coverage in violation of the federal Medicaid Act. Specifically, Defendant Rodgers changed the AHCCCS policies in the Provider Manual and in administrative rule R9-22-217. In addition, Plaintiffs alleged that Defendant Rodgers eliminated the ability of providers to receive prior authorization for kidney dialysis services. Finally, Plaintiffs alleged Defendant Rodgers failed to provide adequate notice and an opportunity for a pre-termination hearing of kidney dialysis services in violation of 42 U.S.C. § 1983.

Plaintiffs filed a Motion for Preliminary Injunction and Motion for Class Certification. A provisional class was certified on September 24, 2002, and modified on October 7, 2002. The class was defined as:

The class shall consist of all persons who are or will be eligible for federal emergency medical services under the AHCCCS Title XIX program, whose end-stage renal disease meets the definition of 'emergency medical condition' set forth in 42 U.S.C. § 1396 b(v)(3) and for whom their physicians have prescribed outpatient hemodialysis treatments three times weekly. The class includes all those individuals who, pursuant to AHCCCS's Title XIX 'extended services' program, had been receiving outpatient dialysis prior to November 1, 2001, and for whom treatment has been continued pursuant to S.B. 1007.

In Court Orders entered on June 17, September 24, and October 7, 2002, a preliminary injunction for the class was granted that prohibited Defendant Rodgers from limiting access to dialysis to Plaintiffs and the provisional class and required AHCCCS to provide coverage of

medically necessary outpatient dialysis treatment as an emergency medical service.

Pursuant to the Court's Order of June 17, 2002, Tommy Thompson, Secretary of the Department of Health and Human Services was named as a Defendant in this action in an amended complaint filed on July 16, 2002. Subsequently, the Secretary filed a motion to dismiss him as a Defendant which was granted on November 26, 2002. On June 16, 2004, this Court reinstated Defendant Thompson as a named defendant in this action to ensure that the preliminary injunction provisions were abided to by Defendant Thompson.

The Plaintiffs and Defendant Rodgers have agreed to resolve this matter without further proceedings.

The parties have agreed that upon the entry of this Consent Decree, the parties will submit a stipulation to dismiss Defendant Michael Leavitt as successor to Defendant Tommy Thompson as Secretary of Health and Human Services as a party.

The parties do not object to the jurisdiction of the Court over this action and waive their right to a hearing and entry of findings of fact and conclusions of law.

The Court, after reviewing the terms of the Consent Decree, the pleadings in this case and any comments from the class members, finds:

1. For the purposes of this Consent Decree, the class is defined as previously certified on October 7, 2002.
2. This settlement is fair, reasonable and adequate.
3. This settlement requires AHCCCS to provide coverage for medically necessary outpatient kidney dialysis as an emergency medical service and for the notice and an opportunity to be heard for AHCCCS denials and termination of coverage service for outpatient kidney dialysis.
4. The parties provided notice to the class of this settlement on January 3, 2007, and a fair hearing was held on February 26, 2007
5. There were no objections to this decree.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. This Consent Decree resolves all the claims of Plaintiffs and the class against Defendant Rodgers arising out of this lawsuit.
2. This Consent Decree is final and binding upon the parties, their successors and assigns.

DEFENDANT RODGERS' ACTIONS

3. Defendant Rodgers, his officers, agents, employees, successors and assigns and all persons in active concert or participation with him, for the duration of the decree, are permanently enjoined from:

A. Failing to provide coverage for medically necessary outpatient kidney dialysis treatment as an emergency medical service under Medicaid ("emergency medical services") for persons with End Stage Renal Disease. By this injunction, AHCCCS returns to the policies it utilized prior to October 2001.

B. Failing to provide for prior authorization for coverage for medically necessary outpatient kidney dialysis services based upon a physician's monthly certification of the following:

I am the treating physician for [member's name], who has been diagnosed with end-stage renal disease (ESRD). It is my opinion that in the absence of the following dialysis treatments per week, the patient's ESRD would reasonably be expected to result in:

- Placing the patient's health in serious jeopardy;
- Serious impairment of bodily function; or



(H) Defendant shall provide each of the documents identified in paragraphs (a) - (f) above to Plaintiffs' counsel for review and approval within 45 days of entry of this decree.

#### TRAINING

5. Defendant shall provide training to his employees and agents, including staff at the Arizona Department of Economic Security on the terms of this Consent Decree within 30 days of entry of this decree. Staff to be trained shall include intake and eligibility workers, supervisors and quality review staff.

#### REPORTING/MONITORING

6. Within 60 days of entry of this decree, and every four (4) months thereafter, Defendant shall provide Plaintiffs' counsel an affidavit by Defendant Rodgers stating that the actions required in paragraph four (4) of this decree are still in effect.

#### ATTORNEYS' FEES AND COSTS

7. Defendant agrees that Plaintiffs' counsel are entitled to attorneys' fees and costs.
8. Within 30 days of entry of this decree, Plaintiffs' counsel shall submit a request for attorneys' fees and costs to Defendant Rodgers. If the parties are unable to agree to an award of attorneys' fees and costs for Plaintiffs, then Plaintiffs shall file a bill of costs and motion for attorneys' fees and costs pursuant to Local Rules 54.1 and 54.2. In response to the motion for attorneys' fees, Defendant Rodgers could not challenge Plaintiffs' entitlement to fees and costs, but only the amount of the request. Plaintiffs' time to file the bill of costs and motion for attorneys' fees shall be extended to 60 days after Plaintiffs submit their written request to Defendant Rodgers. Plaintiffs shall have an additional 30 days to submit their Memorandum in Support of Motion for Attorneys' Fees and all supporting documentation.

#### LIMITATIONS

9. No provision of this decree shall infringe upon any applicant's right to seek relief against Defendant in the appropriate forum for an alleged violation of the Medicaid Act not addressed in this decree..

#### ENFORCEMENT

10. The provisions of this decree shall remain in effect for the duration of this decree unless there is a change in the federal Medicaid statute that directly affects the Federal Emergency Services program under Title XIX. If Defendant believes that a change in the federal Medicaid statute directly affects the terms of this decree, Defendant shall give Plaintiffs' counsel notice of the change within 30 days of when Defendant found out about the change. The notice shall include the following:
- a. The federal change in law;
  - b. When Defendant was informed of the change;
  - c. The manner in which Defendant believes the change affects the terms of the decree; and
  - d. The basis of Defendant's conclusion in paragraph c.

Plaintiffs shall have 30 days from receipt of the notice to either advise Defendant that Plaintiffs agree with Defendant's interpretation or that they disagree and will file a motion in court to request judicial intervention or interpretation.

11. At least 30 days prior to filing a motion for enforcement or contempt of this Consent Decree based upon a claimed violation by Defendant, Plaintiffs shall provide written notice to Defendant of the nature and specifics of the claimed violation in order to give Defendant an opportunity to cure the alleged violation(s).

#### JURISDICTION

12. The duration of this decree is twenty-four months from the date the Consent Decree is filed with the Court.

13. The Court shall retain jurisdiction over this action for twenty-four months and any additional time period necessary for any enforcement and contempt action commenced before the expiration of the twenty-four month period, during which Plaintiffs may petition this Court for compliance with the decree.

14. At the end of the twenty-four month period in paragraph 13, if Plaintiffs have not petitioned this Court for modification, enforcement or contempt, then this case shall be dismissed by the Court.

15. The failure of Defendant to implement or otherwise execute any of the agreed upon terms of this decree shall constitute a violation of the order of this Court and shall be fully enforceable by this Court.

16. The parties agree to entry of this Consent Decree, subject to final approval by the Court.

DATED this 26th day of February, 2007.

(signed)

Frank R. Zapata

United States District Court Judge

APPROVED AND CONSENTED TO:

ARIZONA CENTER FOR DISABILITY LAW

By            (signed)

Sally Hart

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Tucson, Arizona 85701

WILLIAM E. MORRIS INSTITUTE  
FOR JUSTICE

JOHNSTON LAW OFFICES PLC

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By \_\_\_\_\_ (signed)

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By            (signed)

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